

2002

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Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject

Joshua Dressler†

I wrote my first article on provocation law more than twenty years ago.¹ I have never lost my interest in the subject.² My original goal was to make sense of a doctrine that, at once, seemed to suggest that provoked killings are partially justified and partially excusable.³ Since then, my understanding of the provocation defense⁴ has changed a bit,⁵ but until recently I

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1. Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 439-41 (1982) [hereinafter Dressler, *Rethinking Heat of Passion*].

2. My other articles on the topic are Joshua Dressler, *Provocation: Partial Justification or Partial Excuse*, 51 MOD. L. REV. 467 (1988), and Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726 (1995) [hereinafter Dressler, *"Heterosexual" Men*].

3. Readers still not sensitive to the distinction between justification and excuse defenses may find a brief primer of use. *E.g.*, Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1161-67 (1987).

4. Provocation is a full defense in the sense that it ordinarily results in acquittal of the crime of murder. It is a partial defense in the sense that, unlike defenses such as self-protection, the actor is convicted of some offense, albeit a lesser one than murder. See *infra* note 8. I will use the terms "defense" and "partial defense" interchangeably in this Essay.

5. Provocation law is all about emotions, most notably anger. In my early work I thought of anger as, at most, an excusable response to provocation. Upon further reflection and the scholarship of others, see, *e.g.*, Jeffrie G. Murphy & Jean Hampton, *FORGIVENESS AND MERCY* 16-19, 43-60 (1988); Andrew von Hirsch & Nils Jareborg, *Provocation and Culpability*, in *RESPONSIBILITY, CHARACTER AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY* 241, 248-51 (Ferdinand Schoeman ed., 1987), I came to conclude

never found reason to question the basic wisdom of the defense.

Original heat-of-passion law was narrow.⁶ In 1962, the drafters of the Model Penal Code provided a new, far broader vision of the defense.⁷ The primary issue thereafter seemed to be how far state law would move in the direction of the Code. There was little or no doubt that *some* version of the provocation doctrine would continue to be recognized.

Today, however, provocation law is under attack. Of course, one might expect law-and-order advocates to criticize a doctrine that can permit an intentional killer to avoid conviction for murder.⁸ One can argue that the statutory sentencing differences between manslaughter and murder are too great or too small, but the point is that critics of the defense can hardly

that anger could also be characterized as justifiable. Dressler, "*Heterosexual Men*," *supra* note 2, at 745-49.

6. See Dressler, *Rethinking Heat of Passion*, *supra* note 1, at 428.

7. See *infra* Part V.A.

8. Typically, heat-of-passion homicide constitutes manslaughter. In Illinois, however, heat-of-passion homicide constitutes second-degree murder. 720 ILL. COMP. STAT. ANN. 5/9-2(a)(1) (West 1993). In Colorado, a knowing killing, including one committed as the result of provocation, is denominated as second-degree murder, but the law expressly provides that a heat-of-passion murder constitutes a third-degree felony (ordinarily punishable by from four to twelve years' imprisonment), whereas an unprovoked knowing murder is a second-degree felony (ordinarily punishable by from eight to twenty-four years' imprisonment). COLO. REV. STAT. § 18-3-103(3)(b) (2001); COLO. REV. STAT. § 18-1-105(1)(a)(V)(A) (2001).

The offense of manslaughter is a serious felony that can result in substantial punishment. Punishment for heat-of-passion manslaughter varies by jurisdiction, and although a judge can sometimes impose a relatively light sentence for the crime, she can choose to impose a very severe one in most states. To get a sense of the variations, California sets punishment for voluntary manslaughter at "three, six, or eleven years," CAL. PENAL CODE § 193(a) (West 1999); in the District of Columbia, punishment for heat-of-passion manslaughter may not exceed thirty years' imprisonment, D.C. CODE ANN. § 22-2105 (2001); in Georgia, imprisonment must be not less than one year nor more than twenty years, GA. CODE ANN. § 16-5-2(b) (1999); and in Maine the judge may sentence the provoked killer to a definite period not to exceed *forty* years' imprisonment, ME. REV. STAT. ANN. tit. 17-A, § 1252(2)(A) (West Supp. 2001).

If the defense were abolished, provoked homicides would be treated as murder, typically second-degree (due to lack of premeditation or deliberation) murder. Using the state examples above, in the absence of the defense, punishment in California would be fifteen years to life, CAL. PENAL CODE § 190(a) (West 1999 & Supp. 2002); in the District of Columbia, a sentence not in excess of forty years except in certain aggravating circumstances, D.C. CODE ANN. §§ 22-2104(c), 24.403.01(b-2) (2001); in Georgia, death or life imprisonment, GA. CODE ANN. § 16-5-1(d) (1999) (no second-degree form of murder); in Maine, twenty-five years to life imprisonment, ME. REV. STAT. ANN. tit. 17-A, § 1251 (West 1983 & Supp. 2001) (no second-degree form of murder).

claim that the "defense" treats provoked homicide as a minor offense. Modern criticism of provocation law is more interesting than that, however. Heat-of-passion law has been the subject of ethical, and most especially, feminist attack. We are told that "[v]oluntary manslaughter [heat-of-passion doctrine] has never been a female-friendly doctrine" and, indeed, "continues to perpetuate a violent form of male subordination of women."⁹

Somewhat similarly, commentator Robert Mison attacked provocation law on the ground that it devalues gay victims of violence.¹⁰ Mison, however, did not call for abolition of the defense. Instead, he argued that because of rampant homophobia in society, defendants should not be able to assert a claim that they were provoked to kill as the result of a nonviolent homosexual advance.¹¹ In 1995, I argued against Mison's position.¹² In doing so, I suggested that a stronger case could be made for a wholesale attack on the defense on feminist grounds than by singling out one category of cases for special treatment.¹³

At least one feminist scholar found my 1995 efforts at justifying the provocation defense in homosexual-advance cases "fascinating" and "bizarre,"¹⁴ in light of my feminist concessions. My purpose then, however, was limited to showing that *if* one believed in the provocation defense (as seemed to be Mison's position), it was unprincipled, or at least, inconsistent to categorically exclude nonviolent-homosexual-advance cases from its ambit. Now I wish to defend the doctrine against more systematic attacks.

My defense of the provocation doctrine can ultimately be rejected on various levels. Those who believe a retributive (just deserts¹⁵) philosophy has no relevance in grading criminal of-

9. Emily L. Miller, Comment, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J. 665, 667-78 (2001).

10. Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133 (1992).

11. *Id.* at 136, 177-78.

12. See Dressler, "Heterosexual" Men, *supra* note 2, at 728 ("This Article responds with particularity to Mison's thesis . . .").

13. *Id.* at 762-63.

14. "What is fascinating about Dressler's argument in favour of the provocation defence is the bizarre twist in which feminist arguments against the defence are deployed against Mison, but not against the provocation doctrine." Adrian Howe, *More Folk Provoke Their Own Demise (Homophobic Violence and Sexed Excuses—Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defence)*, 19 SYDNEY L. REV. 336, 359 (1997).

15. Some persons are repelled by retributivism because they equate it with the proposition that it is morally right to hate (and, therefore, hurt)

fenses will find my analysis wrong or irrelevant, as may anyone who persists in viewing the defense as a partial justification, rather than a partial excuse. Beyond that, it must be acknowledged that recognition of *any* criminal law defense or mitigating factor inevitably will result in occasional verdicts that will prove objectionable to fair-minded persons; occasional "bad" results, however, hardly justify abolition of a defense.

Finally, I must stress that feminist concerns regarding the defense deeply concern me, and I concede that I was oblivious to such issues when I began my legal journey into provocation law two decades ago. Feminist scholarship in this field is important. Ultimately, however, I reject the view that criminal homicide law would be more just without the heat-of-passion doctrine.

I develop my arguments for the defense as follows. In Part I, I consider provocation through a utilitarian lens. I argue that efforts to defend the partial defense on such grounds are questionable. If one develops criminal homicide rules on deterrence grounds, a case can be made for abolishing the doctrine or, ironically, expanding the doctrine to a full defense. I submit, however, that utilitarian arguments about the defense are largely beside the point. The provocation doctrine is founded on just deserts grounds; the cases for and against the defense ought to be fought on *that* level.

In Part II, I deal with potential claims that the provocation doctrine should be interpreted as a partial justification defense. Again, if this *were* the basis for the defense, the case for its abolition would be compelling. In Part III, however, I show that the defense should not be understood in justificatory terms. It is a partial excuse based on the actor's partial loss of self-control, although (and here is where confusion lies) the *reason* for the actor's loss of self-control sometimes (but not always) has a justificatory-type component.

In Part IV, I lay out the feminist argument for abolishing the defense, and seek to show that the abolitionist claims are inadequate to the task as long as the defense is understood in

criminals. *E.g.*, 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 80-82 (London, MacMillan 1883). I, too, reject this "assaultive" version of retributivism, see Joshua Dressler, *Hating Criminals: How Can Something That Feels So Good Be Wrong?*, 88 MICH. L. REV. 1443, 1451-53 (1990) (describing three versions of retribution), but not retribution generally. I will use the terms "just deserts" and "retribution" interchangeably to describe the basic retributive idea that wrongdoers should get what they deserve, i.e., punishment proportional to their moral wrongdoing.

just-deserts-loss-of-self-control terms. I also consider the alternative position that the defense should be maintained but significantly narrowed in domestic violence cases. Here, in particular, I discuss and ultimately reject Professor Victoria Nourse's intriguing proposition that the defense should be limited to cases in which the provoking act is itself a wrong that the law would independently punish by incarceration.¹⁶

In Part V, I consider the proper contours of the provocation defense. I look first at the influential Model Penal Code "extreme mental or emotional disturbance" version of the defense.¹⁷ I conclude that although it frees the law from some undesirable common law restrictions, it is a flawed statute. I offer here my own version of a proper provocation defense. It contains sensible components of the Model Penal Code, the English Homicide Act of 1957, and American common law. It is consistent with the underlying rationale of the defense as a partial excuse based on partial loss of self-control, but one that does not undermine the normative anti-violence message of the criminal law.

A final introductory observation: Readers may ultimately disagree with my perspective. I hope one concludes from this Essay, however, that the abolitionist claim is not as obvious as some critics of the defense might have us believe. My plea is for readers, at a minimum, to appreciate the difficulties and complexities of the issue.¹⁸ The defense has a long heritage and, in view of overwhelming modern-day legislative recognition of the defense,¹⁹ we should hesitate long and hard before abolishing or significantly narrowing the centuries-old doctrine.

I. PROVOCATION AND UTILITARIANISM

I will spend relatively little time on utilitarian arguments, not because they are less interesting, but because most modern scholars would agree that the basis for the defense of provocation is found in retributive concepts of desert, i.e., "a concession

16. Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1396 & n.381 (1997).

17. See *infra* note 107.

18. See Martha C. Nussbaum, *A Plea for Difficulty*, in IS MULTICULTURALISM BAD FOR WOMEN? SUSAN MOLLER OKIN WITH RESPONDENTS 105, 114 (Joshua Cohen et al. eds., 1999) (responding to an essay by Susan Okin who called for a feminist critical examination of cultural practices that oppress women).

19. See *supra* note 8.

to human weakness."²⁰ Utilitarian concerns are subordinate, if not makeweight.

The Model Penal Code (MPC) Commentary, seemingly halfheartedly, suggests a utilitarian justification, supplementing the "human weakness" rationale with the common law provocation doctrine. It states that "perhaps"²¹ the non-detrability of the provoked party justifies mitigation: But, will this do? If the actor is so out of control that he²² is truly non-detrable, and if specific deterrence is the basis for the defense, then a very plausible claim can be made that the defense should be total, rather than partial.

We can also make an opposite utilitarian argument. The partial nature of the defense suggests that the provoked party has *not* lost full control; he finds it more difficult, but not impossible, to obey the law. If so, this would seem to be a situation in which the law ought to provide less temptation, not more, to disobey the law, by treating the intentional killing as murder, rather than manslaughter.²³ So, if utilitarians seek to rationalize the provocation doctrine on specific deterrence grounds, a stronger case can be made, I think, for *no* defense or a *full* one than for the present law.

A more plausible utilitarian claim might be that the defense is "recognition of the fact that one who kills in response to certain provoking events should be regarded as demonstrating a significantly different character deficiency than one who kills in their absence."²⁴ Presumably what is meant is that those who kill under provocation have not only a different, *but a less serious*, character deficiency than the ordinary intentional killer. If one is going to travel down this path, however, the im-

20. MODEL PENAL CODE AND COMMENTARIES § 210.3, at 55 (1980); *see also* *Mahe v. People*, 10 Mich. 212, 219 (1862) (providing the defense "out of indulgence to the frailty of human nature").

21. MODEL PENAL CODE AND COMMENTARIES § 210.3, at 55.

22. I use the word "he" throughout this Essay to describe provoked parties because most heat-of-passion defendants (indeed, most persons charged with any crime of violence) are male. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1998, at 340 (Kathleen Maguire & Ann L. Pastore eds., 1999) [hereinafter *CRIMINAL JUSTICE STATISTICS*] (reporting that 83.8% of arrestees in 1997 for violent crime were male).

23. The same argument has been made to abolish the duress defense. *E.g.*, 2 STEPHEN, *supra* note 15, at 107 ("Surely it is at the moment when temptation to [commit] crime is strongest . . . that the law should speak most clearly and emphatically to the contrary.").

24. MODEL PENAL CODE AND COMMENTARIES § 210.3, at 55.

portance of character to a utilitarian, presumably, is in predicting future dangerousness. Such predictions are not highly reliable,²⁵ but it defies common sense to think that, to take examples of potential provocation claims that might arise today, a man who kills in rage from observing his wife's adultery²⁶ or because a female acquaintance rejected his romantic advances,²⁷ is *a priori* less dangerous than the "ordinary" killer (murderer).

Criminal homicides involve a great diversity of cases: from premeditated contract killings to premeditated euthanasia homicides to unpremeditated intentional killings to cases involving no intent to kill at all. Surely a rage killer may be more dangerous—his character flaw is more troubling if there is any meaningful risk that his anger will rise again—than, for example, a son who kills his dying father to put him out of his misery.²⁸ The character flaws of the provoked individual may *seem* more benign—more like our own?—than the flaws of an imagined first-degree (or even second-degree) murderer, but there is no empirical evidence supporting the claim that voluntary manslaughterers are, as a group, less dangerous than murderers.²⁹

25. Our capacity to predict future dangerousness may be improving, but John Monahan recently observed that "the level of predictive validity revealed in the research has at least in the case of violent crime been rather modest." John Monahan, *Prediction of Crime and Recidivism*, in 3 *ENCYCLOPEDIA OF CRIME & JUSTICE* 1125, 1129 (Joshua Dressler ed., 2d ed. 2002); see also JOHN MONAHAN ET AL., *RETHINKING RISK ASSESSMENT: THE MACARTHUR STUDY OF MENTAL DISORDER AND VIOLENCE* 13 (2001) (noting that "research continues to indicate that clinicians' unaided abilities to perform this task [of violence risk assessment] are modest at best"). For an earlier appraisal, see Charles Patrick Ewing, *Preventive Detention and Execution: The Constitutionality of Punishing Future Crimes*, 15 *LAW & HUM. BEHAV.* 139, 141-46 (1991). Ewing observes that "the most optimistic behavioral scientists and legal commentators now seem to believe that the accuracy of predictions of dangerousness . . . is 'probably no better than one valid assessment out of two,'" whereas others believe that the accuracy rate is only one in three. *Id.* at 141.

26. See *Holmes v. Dir. of Pub. Prosecutions*, 2 All E.R. Ann. 124, 128 (H.L. 1946) (holding that a wife's confession of adultery to her husband without more is not sufficient to reduce murder to manslaughter).

27. *People v. Casassa*, 404 N.E.2d 1310, 1312 (N.Y. 1980). The New York Court of Appeals applied the MPC's defense of "extreme emotional disturbance," from which the state's penal statute was drawn. *Id.* at 1316.

28. *State v. Forrest*, 362 S.E.2d 252, 253-54 (N.C. 1987) (affirming a conviction for first-degree murder).

29. Some unpremeditated killings are quite arguably more heinous, and the killers more dangerous, than premeditated homicides. For example, a person who impulsively throws a child into the street to kill the youth is probably

One final utilitarian point: Even if the provoked actor is undeterrable at the moment of killing, this hardly speaks to the question of whether the law can serve a useful role *in advance of the angry attack*. Perhaps the law ought to take the position that those who kill in rage need to make greater efforts to learn how to deal more constructively with their anger so that they don't lash out violently and kill. Abolition of the provocation defense, therefore, might send a useful general deterrence message that people should manage their anger and stress before emotions boil over in violence, or they will be treated the same as those who kill calmly.

The point is that if the provocation doctrine is analyzed through the utilitarian lens, the case for the centuries-old partial nature of the defense—indeed for excuses generally³⁰—is questionable. None of this, however, suggests to me that the defense should be abolished. It suggests that the true basis for the defense will be discovered elsewhere, in retributive concepts of just deserts. As with other excuses, the provocation doctrine is based on conceptions of justice to the wrongdoer.³¹

II. PROVOCATION AS A JUSTIFICATION DEFENSE

Some scholars expressly treat provocation as a partial jus-

more dangerous, and such actions more heinous, than a victim's family member who premeditates a euthanasia killing. It should follow, therefore, that even the suddenness of passion required for common law manslaughter need not support the claim that manslaughterers are less dangerous than second-degree murderers.

30. As discussed *infra* in Part III, the provocation defense is best understood as an *excuse* defense. Despite efforts by Bentham and other utilitarians to defend the existence of criminal law excuses, utilitarian arguments may support the abolition of *all* legal excuses, on the ground that

punishing all [wrongdoers], whether or not they happen to be deterrable closes off any hope a deterrable offender might otherwise harbor that he could convince a jury that he was among the nondeterrable. Moreover, without excuses, prosecutions would be faster and cheaper, convictions more reliable, and the deterrent threat more credible.

Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 263 (1987) (footnote omitted).

31. See *id.* at 264 ("To blame a person is to express a moral criticism, and if the person's action does not deserve criticism, blaming him is a kind of falsehood and is, to the extent the person is injured by being blamed, unjust to him."); Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1361 n.175 (1989) [hereinafter Dressler, *Exegesis of the Law of Duress*] (claiming that "it is a sense of justice . . . that causes us to excuse certain wrongdoers"). Of course, in the case of provocation, which is only a partial excuse, the claim is that it is unjust to punish a person *as severely* as one would a murderer.

tification—as distinguished from an excuse—defense.³² And some critiques of the defense are founded at least in part on the assumption that it is justification-based or are due to the critic's lack of sensitivity to the justification/excuse distinction.³³ Understood in (partial) *excuse* terms, however, recognition of the provocation doctrine does *not* imply that victims are less worthy or that society (partially) condones a killer's actions, any more so than a murder acquittal based on insanity or mitigation based on diminished capacity. Moreover, it is beyond serious dispute that the line between murder and manslaughter is not drawn as it is because a "manslaughter death" is more acceptable than a "murder death." The difference between the crimes is that a murderer is more culpable for his killing than a manslaughterer. As will be seen,³⁴ there *can* (but need not) be a justificatory feature of the doctrine, but it should be characterized as an (partial) *excuse* defense.

The argument for treating provocation as a (partial) justification is that "the defence entails a denial that the defendant's actions were entirely wrongful in the first place."³⁵ Indeed, as I have previously demonstrated,³⁶ some aspects of the common law doctrine are best (or, perhaps, only) explained on justificatory grounds. For example, an old English rule dictated that a husband's sight of his wife's adultery constituted adequate provocation to kill the paramour, which mitigated the homicide to manslaughter, but a similar sighting of unfaithfulness by a fiancé did not result in mitigation.³⁷ This contradiction is explainable on the antiquated patriarchal ground that, because

32. See, e.g., Finbarr McAuley, *Anticipating the Past: The Defence of Provocation in Irish Law*, 50 MOD. L. REV. 133, 139 (1987).

33. For instance, one commentator criticized the use of the heat-of-passion defense in homicides provoked by homosexual advances. See Mison, *supra* note 10, at 136. While often treating the defense as an excuse, the author's critique sometimes was founded on partial justificatory grounds. For example, the author suggested that use of the defense implies the lesser worth of gay victims, see *id.*, and stated that "the difference between murder and manslaughter turns on the distinction between behavior society finds acceptable and behavior that it does not," *id.* at 172.

34. See discussion *infra* Part III.

35. McAuley, *supra* note 32, at 139.

36. Dressler, *Rethinking Heat of Passion*, *supra* note 1, at 439-41.

37. Manning's Case, 83 Eng. Rep. 112, 112 (1793) (finding by jury that adultery is sufficient provocation to reduce the charge to manslaughter); see *The King v. Greening*, 3 K.B. 846, 849 (1913) (holding that the law of provocation does not apply to a couple living together); see also *The King v. Palmer*, 2 K.B. 29, 31 (1913) (noting that the confession of adultery by a wife is sufficient provocation but not a confession by a fiancé).

adultery was considered the "highest invasion of [a husband's] property,"³⁸ the deceased paramour's actions constituted "a form of injustice perpetrated upon the killer . . . whereas 'mere' sexual unfaithfulness out of wedlock [did] not."³⁹ According to this approach, the husband was justified in protecting his property, but the excessiveness of his efforts reduced the justification to a partial defense only. When one understands the basis of this old rule of law, it is easy to consider repealing the provocation defense. Today, however, nobody in the United States would take seriously the wife/fiancé property law distinction, and in any case, if the defense is seen in *excuse* terms, as it should be, this distinction evaporates.⁴⁰

Even when one moves away from such antiquated reasoning, there is additional evidence that courts and legislatures sometimes treat the doctrine as if it were a justification defense. The common law and, often, statutory "misdirected retaliation" rule—namely, that the defense only applies if the provoked party seeks to kill the provoker and not an innocent third party⁴¹—is best explained on justificatory grounds. For example, in an Australian case, a father observed his son knocked down and injured by a car driven by Dibbs.⁴² The father, enraged by the driver's actions, moved towards Dibbs with a knife, intending to attack him, but an innocent bystander prevented him from doing so and was thereupon killed by the father.⁴³ The trial judge's refusal to instruct the jury on provocation was approved by the Victoria Supreme Court, even as it hinted that had the father killed Dibbs, a provocation claim would lie.⁴⁴

Applying an excuse theory (at least, the type I advocate), the court's refusal to allow the jury to consider the provocation

38. *Regina v. Mawgridge*, [1707] Kel. J. 119, 137, *reprinted in* 84 Eng. Rep. 1107, 1115.

39. Dressler, *Rethinking Heat of Passion*, *supra* note 1, at 440.

40. As an excuse claim, a defendant could arguably claim provocation in both cases. The feminist critique, as we will see, while agreeing that the wife/fiancé distinction should be abandoned, would *deny* the defense in both cases. *See infra* text accompanying notes 81-85.

41. *E.g.*, 18 PA. CONS. STAT. § 2503(a)(1)-(2) (1998) (defining manslaughter in terms of "sudden and intense passion resulting from serious provocation by: (1) the individual killed; or (2) another whom the actor endeavors to kill"); *Regina v. Duffey*, 1 All E.R. 932, 932 (Crim. App. 1949) (defining "[p]rovocation [a]s some act . . . done by the dead man to the accused").

42. *Regina v. Scriva* (No 2), (1951) V.L.R. 298, 299.

43. *Id.* at 300.

44. *Id.* at 300-01.

claim was wrong. It is, however, correct if one views provocation as a justificatory doctrine premised on the ground that the deceased's wrongful conduct caused the killer's violent outburst⁴⁵ and, critically, that the deceased—but not the bystander—therefore, (partially) forfeited his right to life, (partially) deserved to die,⁴⁶ or that his death constitutes lesser social harm than the death of an innocent person.

Although as with all moral arguments one may dispute the point, I consider such justificatory reasoning—the suggestion that a person forfeits his right to life (or, incoherently, forfeits part of his life), or that a private aggrieved individual may unilaterally determine that another human being “sort of” deserves death or that his life does not count as much as another's—morally objectionable.

This is not to suggest that such reasoning cannot be found elsewhere in the literature in regard to well-recognized justification defenses, because it can be. In those circumstances, however, in which such reasoning has on occasion justified homicides, the deceased's conduct involved life-threatening behavior, or at least conduct that would have justified the death penalty upon arrest and conviction.⁴⁷ In provocation cases, however, the deceased's alleged behavior is apt to involve nothing more than highly insulting or offensive conduct, or immoral but not physically injurious conduct (e.g., adultery); and, even in more extreme cases, the provocation typically consists of non-capital criminal conduct (e.g., rape of a family member⁴⁸) that may justify severe punishment of the wrongdoer/provoker

45. See McAuley, *supra* note 32, at 137.

46. Can one partially justify the killing on the ground that “he [the decedent] started it?” It is true that the fact that another person comes to the event without clean hands and, indeed, “started it” explains the defendant's anger. This fact begins to explain why we do not blame the defendant for the homicide as much as we would if he had acted without provocation. In my view, however, as long as the provocation does not cross over into a justificatory-like claim of self defense or defense of others, the “he started it” refrain does not justify, even partially, the use of deadly force upon a provoker. The fact that another person “started it” is justification *for some response*, usually a reprimand or some other showing of disapprobation, or even a civil action, but little else.

47. *E.g.*, *Petrie v. Cartwright*, 70 S.W. 297, 299 (Ky. 1902) (explaining that common law felonies were punishable by death, and therefore, by committing a capital crime a felon forfeited his right to life; consequently, use of deadly force against such a person was justifiable).

48. In contrast to the common law, rape is no longer a capital offense in the United States, in part because it leads to constitutionally disproportional punishment for the offense. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

after a fair trial but hardly serves as the basis for privately imposed capital "punishment." So, I am quite willing to agree that if forfeiture or some lesser social harm justificatory theory is the true and only basis for the provocation doctrine, the defense should be abandoned.

There is another way one might try to understand provocation in justificatory terms. Professor Jeremy Horder has provided a fascinating account of English provocation doctrine.⁴⁹ His explanation of early provocation law is based on "Aristotelian notions of just retribution for . . . unjust losses [of personal honor] attributable to provocative wrong-doing."⁵⁰ Horder writes that in the seventeenth century and earlier in England,

[n]atural honour [as distinguished from acquired honor] was the good opinion of others founded in the assumption that the person honoured by the good opinion was morally worthy of such esteem and respect. . . . To treat a man with irreverence, disdain, or contempt, to poke fun at him or to accuse him (even in jest) of failing in point of virtue, was, accordingly, to fail to treat him with respect; it was to undermine or disregard the supposition, at the heart of natural honour, that he was not deficient in any principal virtue.⁵¹

The Aristotelian man of honor, Horder has explained, not only was expected to retaliate against the offender, but was supposed to do so without reluctance.⁵² Indeed, the honorable man was morally justified in responding to provocation (or, at least, to those forms of provocation recognized in early common law) in anger, but with a specific type of anger: "anger as outrage,"⁵³ rather than anger based on loss of self-control. The hot-blooded response of the man of honor was *not* an out-of-control response to an affront, but was a morally justified hot-blooded and *controlled* rational retaliation in proportion to the nature and degree of provocation involved.⁵⁴

What if the man of honor responded disproportionately to the provocation? Then, the offense was manslaughter if the actor's response was only slightly excessive; it was murder if the response was grossly excessive, i.e., the taking of life in response to a very trivial provocation.⁵⁵

49. JEREMY HORDER, *PROVOCATION AND RESPONSIBILITY* (1992).

50. G.R. Sullivan, *Anger and Excuse: Reassessing Provocation*, 13 OXFORD J. LEGAL STUD. 421, 422 (1993) (explaining Horder's thesis).

51. HORDER, *supra* note 49, at 26.

52. *Id.* at 27.

53. *Id.* at 59-71.

54. *Id.* at 27.

55. *Id.* at 64.

One could take from Horder's account that provocation should be treated as a partial justification founded on an actor's right to respond with moderate violence to an attack on honor.⁵⁶ Such a conclusion, however, strikes me as conceptually wrong. Either a person has a right to act in a certain manner or he does not. Even if one has a right to respond to provocation with non-deadly force (and, thus, be acquitted), a homicide—doing what one does *not* have a right to do—should be explained (if at all) in excusatory terms. In any case, even if Horder's account explains seventeenth century (and earlier) English attitudes, it is not proper *today* in the *United States* for a "virtuous person" to respond violently—even to commit a battery—in mere defense of one's honor.

Therefore, the remainder of this Essay is founded on the assumption that the provocation doctrine should not be (and, generally, is not today) understood in justificatory terms. The defense is excuse-based.

III. PROVOCATION: WHY WE PARTIALLY EXCUSE HOMICIDE

The provocation defense is an excuse defense, albeit a partial one, but one that may (but need not) have a justification-like component. My best effort to explain basic provocation law⁵⁷ runs as follows: An intentional homicide is not mitigated to manslaughter unless certain conditions are met. First, there must be a provocative event that results in the actor feeling rage or some similar overwrought emotion.⁵⁸ It is important here to understand why the provocation does—and does not—result in anger. It is not that the provocation "touches a nerve" as, for example, when a person drops a cup when he is stung on the hand by a wasp.⁵⁹ The act of dropping the cup—the wasp almost literally hitting a nerve—is a physiological action (in le-

56. Horder, however, does *not* make this claim. He couches the defense in excuse terms, and thereafter, proposes that the provocation doctrine be abandoned. *Id.* at 186-97.

57. I put aside for now the Model Penal Code's approach to the doctrine, which contains a diminished capacity component that complicates analysis. *See infra* text accompanying notes 120-25. All I seek to do here is provide an explanation for a relatively traditional provocation doctrine.

58. *See* People v. Borchers, 325 P.2d 97, 102 (Cal. 1958) (defining "passion" in the heat-of-passion doctrine as including any "[v]iolent, intense, high-wrought or enthusiastic emotion" (quoting Webster's New International Dictionary (2d ed.))).

59. HORDER, *supra* note 49, at 119.

gal terms, an involuntary act) and not one "mediated by judgment and reason."⁶⁰ In the provocation context, however, anger is preceded by some judgment by the provoked party, even if it occurs instantly, that he or another to whom he feels an emotional attachment has been wronged in some manner by the provoker.⁶¹ In the ordinary provocation case, for example, when the provoker spits in another's face, uses insulting racial epithets, wrongs the individual by assaulting him, or commits some harm to a loved one, the provoker sends a disparaging message (or, at least, the provoked party reasonably interprets it this way) or commits a seeming injustice, which incites the victim of the provocation to fury.

Fury, however, is not enough to activate the defense. The law considers only some provocations "adequate" to reduce a homicide to manslaughter. If we believe that the provocation is the type that entitles a person to feel anger, or even more strongly, if we feel that the provocation should make a person feel anger or outrage, e.g., when a person is verbally insulted or spat upon, then we may characterize the emotion as, in some sense, "justifiable"⁶² or, if you will, appropriate.⁶³ In this very limited way the heat-of-passion doctrine *potentially* contains a "justificatory" feature.

The basis for mitigation, however, does not require a finding that the provoked party's anger or outrage is one we find appropriate or of which we approve ("justifiable"). It is enough that we are prepared to "excuse"⁶⁴ the actor for feeling as he

60. *Id.* at 117.

61. I use the term "another" broadly enough to include an actor's attachment not only to another person, but to another living thing (e.g., the actor's pet dog is thrown by the decedent into the road, where it is killed; Maria L. La Ganga, *Jury Convicts Man Who Hurling Dog Into Traffic*, L.A. TIMES, June 20, 2001, at A1).

62. I am using the term "justification" here loosely because these terms are ordinarily reserved to characterize conduct rather than emotions. (Thus the quotations marks around the words in the text.)

63. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 320 (1996).

64. Again, *see supra* note 46, I use the word "excuse" loosely, since the term ordinarily applies to blameless people and not to blameless emotions. Indeed, to "excuse" a person's feelings may suggest that a person can be morally to blame for having certain feelings or emotions. It is far from obvious, however, that people have meaningful control over their feelings or emotions, as distinguished from their conduct, so this terminology is imprecise.

This topic deserves far more attention than a footnote. It is enough for me to say here that people *do* commonly consider certain feelings and emotions, separate from conduct, as "good" or "virtuous" (e.g., feelings of compassion) or

does, or perhaps more precisely, we empathize with the actor's feelings. We must remember that the provocation defense is based to a considerable extent on the law's concession to ordinary human frailty; the ultimate question, therefore, is whether we (or the jury) consider the provoked party's anger within the range of expected human responses to the provocative situation. Put somewhat differently, we must decide if the provocative event might cause an ordinary person⁶⁵—one of ordinary and neither short nor saintly temperament—to become enraged or otherwise emotionally overcome.

For example, consider a person's emotional upheaval in being informed by his long-time married paramour that she intends to end the relationship and return to her husband. A jury may be unwilling to think of the man's anger or other passionate emotions as justifiable. After all, the woman had every right—indeed, perhaps a moral duty—to call off the relationship, and thus the man had no right to expect the woman to continue the relationship. A jury, however, could (not necessarily would) consider the man's emotional outburst "excusable" ("empathizable?"),⁶⁶ even if it were not prepared to characterize it as appropriate. That is enough to meet the first ingredient of the provocation defense.

One must keep in mind—although critics of the provocation doctrine often do not—that "justifying" or "excusing" the

"bad" or "unvirtuous" (e.g., feelings of pleasure in observing another's tragedy). When a person has "bad" (wrongful) emotions, we criticize that person. Absent evidence of mental illness or the like, we do not "excuse" him for feeling as he does.

65. Most courts in provocation cases use the term "*reasonable man*" or "*reasonable person*" when instructing the jury on the concept of "adequate provocation" and on the "cooling off" requirement, i.e., that the killing occur before a "reasonable person" would have cooled off. Some courts, however, use the term "ordinary" person. *E.g.*, *Maher v. People*, 10 Mich. 212, 220 (1862). The latter term avoids the oddity of describing a "reasonable person" as one who acts on occasion in a rage, rather than with due deliberation. On the other hand, use of the word "reasonable" reinforces the important point that the objective standard contains a normative component and is not merely descriptive. I will use the term "reasonable person" and "ordinary person" interchangeably in this Essay.

66. I (and I suspect most readers) would feel this way, but one can always add to the facts to strengthen the argument that a jury *might* excuse the rejected man for his emotional state. Perhaps the paramour promised to leave her husband and marry him, and in reliance on these assurances he made significant changes in his life (changed jobs), only to have her decide not to marry him. Now, a jury might even consider his anger appropriate ("justifiable"). Either way—"justifiable" or "excusable"—this aspect of the provocation doctrine is satisfied.

provoked party for his emotional upset does not in itself entitle the defendant to mitigation for a killing. My use of the term "emotional outburst" in the last paragraph was purposeful: It points us in the direction of why provocation is an excuse defense, and not a justification. The modern defense is not about justifiable and controlled anger as outrage to honor; it is about excusable loss of self-control. It is not enough simply to say that a defendant's anger, which was mediated by judgment and reason, was, in the sense I have explained, justifiable or excusable: The provocation must be *so* serious that we are prepared to say that an ordinary person in the actor's circumstances, even an ordinarily law-abiding person of reasonable temperament, might become sufficiently upset by the provocation to experience substantial impairment of his capacity for self-control and, as a consequence, to act violently.

Under no circumstances is the provoked killing justifiable *in the slightest*; indeed, the actor's violent loss of self-control is unjustifiable. Moreover, the loss of self-control is not totally excusable, because the law's assumption is that the provoked party was not *wholly* incapable of controlling or channeling his anger. If he were totally incapable, a *full* excuse would be defensible.⁶⁷ Instead the defense is based on our common experience that when we become exceptionally angry—remembering that we are not blaming the person for his anger—our ability to conform our conduct to the dictates of the law is seriously undermined, hence making law-abiding behavior far more difficult than in nonprovocative circumstances.⁶⁸ It is this under-

67. Dressler, *Rethinking Heat of Passion*, *supra* note 1, at 465-66, 468.

68. A person is properly excused for his conduct if he lacked the *capacity* or *fair opportunity* to freely choose whether to violate the moral or legal norms of the community. More specifically, "[f]ree choice" exists if the actor has the substantial capacity and fair opportunity to: (1) understand the pertinent facts relating to his conduct; (2) appreciate that his conduct violates society's moral or legal norms; and (3) conform his conduct to the law." Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 701 (1988) [hereinafter Dressler, *Reflections*]. In the case of provocation, we say that the defendant experienced a partial, temporary, and substantial lack of capacity (rather than fair opportunity) to conform his conduct to the law (the third element of the "free choice" standard). The provocation defense, therefore, focuses on the internal mechanisms of the provoked party and focuses on his (partially) excusable (significant) loss of capacity for self-control.

Arguably, the provocation defense may be defended, like the duress defense, on the ground that the provoked party lacked a fair *opportunity* to conform his conduct to the law. In cases of coercion—when a gun is literally or figuratively put to the head of the coerced party—we excuse the latter's crimi-

standably greater difficulty to control conduct that appropriately mitigates a provoked actor's blameworthiness, and therefore, his responsibility for a homicide.

IV. FEMINIST CHALLENGES TO THE DEFENSE

A. THE ABOLITIONIST ARGUMENT

Most provocation abolitionists come to their view from a feminist perspective. One critic has written that "provocation operates as a deeply sexed excuse for murder and should be abolished."⁶⁹ Further, "nowhere except perhaps in rape cases[] is the gendered—or, more accurately 'sexed'—nature of law more apparent than in so-called domestic homicide cases in which men kill women and then claim provocation."⁷⁰ The feminist claim for abolition of the defense basically runs as follows.

Provocation is a male-centered and male-dominated defense.⁷¹ Although the defense is supposedly founded on compassion for ordinary human infirmity, it is really a legal disguise to partially excuse male aggression by treating men "as natural aggressors, and in particular *women's* natural aggressors."⁷² Men who are provoked desire to inflict retaliatory suffering on those who have attacked their self-worth. More often

nal conduct on the ground that she did not have a fair opportunity to obey the law. Dressler, *Exegesis of the Law of Duress*, *supra* note 31, at 1365. In essence, an *external* event, for which the actor is not morally responsible, acts upon her to make the choice to obey the law too difficult to fairly attach blame to her for not selecting the right option. One might plausibly say that provocation similarly functions to reduce choice-making *opportunities*, rather than undermining the actor's *capacity* to choose the correct (nonviolent) path.

There *are* similarities between provocation and duress. Indeed, since provocation is a valid partial excuse to murder, gun-to-the-head duress should *at least* partially excuse a homicide, although the common law rejects *any* defense in this regard. *Id.* at 1370-74 (arguing for a potential *full* excuse in such circumstances). Nonetheless, I believe that provocation is better understood in loss-of-self-control (more accurately, partial-loss-of-capacity-for-self-control) terms than in lack-of-fair-opportunity terms. In duress cases, we sense that the coerced party *chooses* to accede to the coercer's threat; it is in a real sense a *rational*, albeit perhaps socially unjustifiable, choice. We excuse the actor because her choices were unfairly hard. In contrast, with provocation, the killing is the result of an emotional explosion almost immediately following the provocation. The homicidal act here is the antithesis of rationality.

69. Howe, *supra* note 14, at 337.

70. *Id.* at 356.

71. See HORDER, *supra* note 49, at 193-94.

72. *Id.* at 192.

than not, the self-worth "attackers" are women. In studies of battered women, for example, violence is prompted by male possessiveness and sexual jealousy;⁷³ a male's feelings of self-worth require "absolute possession of a woman's sexual fidelity, of her labour, and of (on demand) her presence, love, and attention in general."⁷⁴ In reality, therefore, the defense simply reinforces precisely what the law should seek to eradicate, namely, "men's violence against women, and their violence in general."⁷⁵

These observations are accurate in many respects, but I submit that they do not justify abolition of the defense. Feminists are correct, of course, that the defense largely benefits men—but let's put this in perspective. First, the victims of male violence are more often than not other men, rather than women.⁷⁶ Second, it is true that the provocation defense benefits men,⁷⁷ but so do all other excuse and justification defenses, most of which are not considered controversial, because men, far more often than women, kill people for *all* reasons.⁷⁸ Finally, in relation to the specific issue at hand, it should be remembered that the provocation defense is raised in many cases that do *not* involve male-on-female (or same-sex) intimate violence.

73. *Id.* at 193 (citing a 1984 study by Dobash and Dobash).

74. *Id.*; see also Nourse, *supra* note 16, at 1343-51 (summarizing studies, including her own, of intimate homicides, in which a high number, often a majority, of intimate homicides involve some element of separation by a wife, ex-wife, or unmarried lover from the homicidal male, and a somewhat lesser, but significant, number of cases involve claims of infidelity).

75. HORDER, *supra* note 49, at 194.

76. In 1998, 75.3% of all homicide victims were male. FED. BUREAU OF INVESTIGATION, U.S. DEPT OF JUSTICE, CRIME IN THE UNITED STATES: UNIFORM CRIME REPORTS 1998, at 14 (1999).

77. The critical empirical questions here are: How often is the provocation defense raised by men in intimate violence cases; and, far more critically, how often is it successful? There are no reliable data on this. The most we have is one Justice Department study of "spousal murder" prosecutions in large urban counties, which suggests that among homicides that resulted in a jury verdict rather than a pre-trial guilty plea disposition, 29% of the verdicts were for voluntary manslaughter and 9% for negligent manslaughter. Nourse, *supra* note 16, at 1348 n.101 (citing PATRICK A. LANGAN & JOHN M. DAWSON, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, SPOUSE MURDER DEFENDANTS IN LARGE URBAN COUNTIES, at iv (Sept. 1995)). The voluntary manslaughter figure includes not only provocation cases but also verdicts based on reckless manslaughter and imperfect self-defense claims in states that recognize this defense.

78. In 1997, 89.7% of all persons arrested in the United States for murder or non-negligent manslaughter were male. CRIMINAL JUSTICE STATISTICS, *supra* note 22, at 340.

That the provocation defense is primarily invoked by males is an insufficient reason to repeal it unless we are prepared as well to call into question all the other defenses, including self-defense, that are more often claimed by men than by women. If there are legitimate grounds for the defense, as I have sought to show—reasons, it ought to be pointed out, that apparently strike a responsive chord with female jurors, too, since manslaughter verdicts require juror unanimity—we ought to retain the defense.

Furthermore, lest we forget, *women* sometimes claim the provocation defense. Indeed, provocation represents the only (or, at least, best) partial defense to murder available to battered women who kill their abusers in many (perhaps most) jurisdictions.⁷⁹ To abolish the defense is to deny some women (battered or otherwise) the ability to claim a provocation defense on the Holmesian utilitarian ground that “justice to the

79. A battered woman may claim self-defense, and if valid, be acquitted. If she kills in non-confrontational circumstances, that is, at a time when the abuser is asleep or in some other passive condition, or if she kills during a significant lull in the violence, the absence of an imminent threat will usually leave the battered woman without a valid self-defense claim, although an increasing number of jurisdictions now recognize a partial defense based on “imperfect self-defense” (unreasonable use of self-defense). See generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 18.03 (3d ed. 2001) (discussing imperfect self-defense).

A battered woman may claim diminished capacity to reduce the offense to manslaughter in jurisdictions that retain this partial excuse, but it is a defense based on a potentially demeaning assertion of mental dysfunction by the woman, a claim that can be avoided by pleading provocation, which asserts that her emotional response is one that a reasonable or ordinary person might experience.

Elsewhere I have suggested that battered women who kill in non-confrontational circumstances should be permitted to plead a *full* excuse, based on principles similar to duress. Joshua Dressler, *Battered Women Who Kill Their Sleeping Tormenters: Reflections on Maintaining Respect for Human Life While Killing Moral Monsters*, in CRIMINAL LAW: DOCTRINES OF THE GENERAL PART 259 (2002).

Some commentators claim that the provocation defense is unavailable to battered women, on the ground that only rage—not fear or terror—is a recognized emotion in heat-of-passion cases. Christina Pei-Lin Chen, *Provocation's Privileged Desire: The Provocation Doctrine, "Homosexual Panic," and the Non-Violent Unwanted Sexual Advance Defense*, 10 CORNELL J.L. & PUB. POL'Y 195, 221 (2000). This is false. See *supra* text accompanying note 58. In any case, there is no theoretical reason for such a limitation, and even more to the point, there is no practical way to enforce such a distinction. A battered woman who kills her abuser doubtlessly experiences many emotions, one of which is likely to be (justifiable) anger or outrage at the batterer's treatment of her.

individual is rightly outweighed by the larger interests on the other side of the scales."⁸⁰ For those who advocate retributive just deserts, however, that is not a satisfactory reason for denying women the opportunity to assert their excuse claim, even assuming the accuracy of the premise that abolition of the defense will have a positive general or specific deterrent effect on male domestic violence.⁸¹

In any case, utilitarian critics of the provocation doctrine miss the real point of the defense: The provocation defense is about human imperfection and, more specifically, impaired capacity for self-control. The defense recognizes the fact that anger (and other emotions) can affect self-control. The defense does not exist to justify or condone male violence or female victimization, nor even to justify or condone any particular emotion. Instead, the defense recognizes a rather ordinary fact: In provocative circumstances, ordinary people become angry, self-control in such circumstances is more difficult, and in some cases twelve jurors, probably both men and women, will deter-

80. OLIVER WENDELL HOLMES, *THE COMMON LAW* 48 (1943).

81. I have already considered utilitarian issues relating to the provocation defense, *see supra* Part I, but two other points might be made here. First, although I have no empirical evidence to support my utilitarian intuitions, I seriously doubt that abolition of the provocation defense would result in a meaningful reduction in male violence toward women. Male violence generally, and intimate violence in particular, are the result of various interrelated biological, cultural, even arguably evolutionary, factors. On the latter point, *see generally* Martin Daly & Margo Wilson, *Family Violence: An Evolutionary Psychological Perspective*, 8 VA. J. SOC. POL'Y & L. 77 (2000). While humans have the capacity for free choice (at least in the compatibilist or soft determinist sense) despite these factors, I seriously doubt that repeal of a partial excuse will cause many violent men to choose nonviolence in provocative circumstances. With or without the defense, a provoked killer will (or, certainly can) receive a substantial prison sentence, and the difference in penalties between a manslaughter and murder conviction, *see supra* note 8, is not likely to be great enough to do the feminists' work and, therefore, justify sacrificing the individual (including female defendants) for the greater social cause.

Second, criminological research consistently confirms that on an age-crime curve, the crime rate in the United States generally peaks in adolescence and early adulthood. Most (although not all) crime today in the United States is committed by persons under the age of thirty. *See* Darrell Steffensmeier & Jeffery Ulmer, *Age and Crime*, in 1 *ENCYCLOPEDIA OF CRIME & JUSTICE* 31 (Joshua Dressler ed., 2d ed. 2002). Thereafter the crime rate declines, albeit at different rates depending on the criminal offense. There are various explanations for this, some of which are crime-specific, but reduced levels of testosterone and somewhat reduced use of intoxicants are of some significance with violent crimes. *See id.* at 31-36. Thus, in many cases, a manslaughterer will leave prison at an age during which recidivism is a much less significant risk.

mine that the provoked person who kills is less culpable than one who kills while in control.

B. NARROWING THE DEFENSE: PROFESSOR NOURSE'S PROPOSAL

If I am right in my defense of the doctrine (that it should not be abolished), we are still left with the question of what form the defense should take. Professor Victoria Nourse has provided a thoughtful reform proposal that deals with feminist concerns by significantly narrowing the defense in domestic violence cases. She says,

When a defendant asks for our compassion,⁸² he asks us to allow him to legislate vis-à-vis his victim, to claim that we should share his emotional assessment of wrongdoing and blame. . . . [But, t]o merit the reduction of verdict typically associated with manslaughter, the defendant's claim to our compassion must put him in a position of normative equality vis-à-vis his victim. *A strong measure of that equality can be found by asking whether the emotion reflects a wrong that the law would independently punish.* This is not because the law makes his emotion "right," or "proportional," but because the "law" reflects an *ex ante*, *disinterested* determination of the normative equities implicit in the defendant's claim for compassion.⁸³

In Nourse's scheme, the law would "bar many, if not most, provocation claims in intimate homicide cases."⁸⁴ To be entitled to mitigation, the provoked party would have to point to a criminal law, and not simply a "widely shared social norm[],"⁸⁵ that would justify punishing the *decedent* for the provocative action. Thus, for example, the provocation doctrine would not apply to a husband who observes his spouse in an act of adultery because "[s]ociety is no longer willing to punish adultery. . . . This does not mean infidelity is not emotionally painful. It does mean that those who urge compassion based on infidelity can point to nothing in the law itself that would de-

82. By this sentence, Nourse seemingly equates compassion with excusing. Although there is often a connection between feelings of compassion and recognition of legal excuses, the law may properly excuse a person even if we lack compassion for the offender (for example, we excuse insane people even though our fear of them may sometimes prevent us from feeling compassion toward them), and there are many cases in which we feel compassion for an individual whom we properly refuse to excuse (for example, persons from awful social environments who commit crimes). See Dressler, *Reflections*, *supra* note 68, at 682-89; Dressler, *Exegesis of the Law of Duress*, *supra* note 31, at 1360-61. Justice, not compassion, is the true basis for recognizing legal excuses.

83. Nourse, *supra* note 16, at 1396 (initial italics added).

84. *Id.*

85. *Id.* at 1396 n.383.

mand that we have compassion for their violent outrage."⁸⁶ It does not matter to Nourse that, as she concedes, most persons consider marital infidelity "a grave wrong."⁸⁷ According to her, the key is that the same people who consider adultery a grave wrong "would not support a referendum to put adulterers in jail."⁸⁸

What should we make of this proposal? There is an initial point we should consider: By limiting the defense to criminal wrongs, we might reach the "right" result—more accurately, the result most readers of Nourse's and *this* Essay might reach—more often than we do now. Yet, even if I (or you, the reader) would more often prefer the outcomes in Nourse's world to those rendered in the current legal system,⁸⁹ this is insufficient reason to accept her proposal. Our preference for Nourse's "verdicts" over ordinary juries may simply be the result of the fact that we are trained in the law, and thus we represent a non-random sampling of the community in which we live. Indeed, there is occasional anecdotal evidence that jurors see the world, and especially issues of moral blameworthiness, differently than law-trained persons.⁹⁰ That, however, is the point of the jury system: The reason why the constitutional framers favored trial by jury, and therefore, incorporated the right in the Sixth Amendment, is that an accused person who prefers "the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of a single judge . . . [is] to have it."⁹¹

Admittedly, one person's common sense may be another person's prejudice. What makes the jury system so important, however, is the power of the idea of *twelve* persons—today, inevitably, both men and women, often of different racial and cul-

86. *Id.* at 1396.

87. *Id.* at 1396 n.383.

88. *Id.*

89. We lack reliable data on how successful provocation domestic violence claims are with juries, *see supra* note 77, so we can only *assume* that Nourse's changes would have a significant outcome impact.

90. *See, e.g., Court Says Woman Deserved Beating*, PALM BEACH POST, March 4, 1995, at 12A (reporting that in Norway a male defendant was acquitted for beating his girlfriend because she frequently berated him; the two lay jurors on the three-person panel voted to acquit; the judicial member dissented); *see also* Joshua Dressler, Peter N. Thompson & Stanley Wasserman, *Effect of Legal Education Upon Perceptions of Crime Seriousness: A Response to Rummel v. Estelle*, 28 WAYNE L. REV. 1247 (1982) (reporting that a law school course in criminal law affects perceptions of crime seriousness).

91. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

tural backgrounds—unanimously blaming (or excusing) a criminal defendant for his actions. The criminal law is all about *community* condemnation of wrongdoers,⁹² so it follows that a fairly selected jury is institutionally better qualified than a judge (or legal scholar) to determine whether the defendant's conduct justifies the community's approbation.⁹³ We should seriously question, therefore, reform measures that significantly limit the jury's role in criminal cases, as Nourse's proposal would do.

Nourse would presumably respond to my pro-jury position by saying that it

simply evades . . . the lurking normative questions. Arguing that juries 'should decide' tells us nothing about which cases 'should' go to juries. The very act of sending a case to a jury requires some kind of normative judgment, some choice about those cases in which a rational jury could find a 'reasonable' explanation for rage.⁹⁴

Fair enough. I will have more to say on this subject later,⁹⁵ but it is fair to ask whether Nourse herself has provided an appropriate line. Her test is "whether the emotion reflects a wrong that the law would independently punish." Is that line as bright or coherent as we might think? First, even accepting her distinction, is Nourse willing to stick by her standard? Some states still prohibit adultery,⁹⁶ so would she permit provocation claims to be brought in *those* states while denying it in others, or would she delve more deeply into the matter to determine how often prosecutions are actually brought in such jurisdictions?

Notice that even if one agrees with Nourse's thesis—which I do not—that the provocation doctrine should be limited to illegal acts and not encompass non-criminal violations of widely shared social norms, she distorts the issue with her "only if we jail 'em" referendum comment.⁹⁷ As Professor Henry Hart has written, "[w]hat distinguishes a criminal from a civil sanction

92. See *infra* text accompanying notes 98-100.

93. Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409, 414 n.27 (1998) (stating that because criminal convictions are the expression of the community's condemnation of the actor, a jury is in the better position to determine the defendant's condemnation).

94. Nourse, *supra* note 16, at 1372.

95. See *infra* Part V.C.

96. See, e.g., ARIZ. REV. STAT. 13-1408 (2001) (criminalizing adultery as a Class 3 misdemeanor).

97. See *supra* text accompanying note 88.

and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition."⁹⁸ "The essence of punishment for moral delinquency lies in the criminal conviction itself,"⁹⁹ and not in the incarceration of the offender. Hart explains that a crime "is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community."¹⁰⁰ Thus, the issue for Nourse should *not* be whether the public would jail the ordinary adulterer—perhaps a majority of the public would not jail the ordinary first-time thief either, and yet theft is a moral wrong and crime—but whether a majority believe that sexual infidelity deserves the "formal and solemn pronouncement of the moral condemnation of the community."¹⁰¹ It seems, however, that she might deny the provocation defense, even in states that criminalize sexual infidelity, in the absence of proof of adultery prosecutions resulting in imprisonment (which is an odd requirement).

Second, why does she draw a criminal/non-criminal line? Why should the provocation defense be denied to a person who observes his spouse's sexual infidelity in a jurisdiction that does not criminalize adultery, while potentially permitting a provocation claim if someone spits in the person's face (a criminal battery)? Why should the defense be disallowed if someone uses a horrible racial epithet to insult me, but be allowed the defense if it turns out that this insult violated a criminal law?¹⁰² Is it simply that Nourse has developed a rule that conveniently bars most domestic violence provocation cases while permitting the defense to do its ordinary work in other areas?

Nourse's explanation is that

[t]he law only suffers contradiction when it refuses to embrace a sense of outrage which is necessary to the law's rationalization of its *own use of violence*. When the law refuses to jail adulterers, the contradiction operates the other way: We are compelled to ask why it is that private parties may enforce a sense of outrage that society has re-

98. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958).

99. George K. Gardner, *Bailey v. Richardson and the Constitution of the United States*, 33 B.U. L. REV. 176, 193 (1953).

100. Hart, *supra* note 98, at 405.

101. *Id.*

102. And, what if the criminal law prohibiting the use of racial epithets is unconstitutional for violation of the First Amendment? Does that affect the analysis—society *wants* to punish the provoker but cannot?

fused itself.¹⁰³

As before, one might start by questioning why the only form of societal "outrage" that matters is the type that results in incarceration of the wrongdoer, as distinguished from other forms of societal condemnation of the actor short of incarceration. Beyond this, however, Nourse's statement demonstrates the crux of my disagreement with her reasoning. The basis of the provocation defense, as she sees it, is that a defendant is partially excused for acting violently toward a person against whom society would also use violence (albeit in the less excessive form of incarceration). So understood, as Nourse rightly observes, "[t]o adopt [her] theory . . . requires us to reject the idea upon which almost all contemporary theories of the defense are predicated: that we partially excuse because the defendant lacks a full or fair capacity for self-control."¹⁰⁴

Why does Nourse reject this understanding of the rationale of the doctrine? Here is her reasoning:

Our belief that persons who lack self-control deserve less punishment purports to depend upon an analogy with physical coercion: The emotion is seen as the "gun to the head" of the defendant. The problem with this analogy is there is no intellectually defensible stopping point: If true, we should be excusing almost all defendants (because almost all defendants kill in a state of high emotion), and the provocation defense should not be a mitigating factor but a full defense. When we mitigate rather than acquit, we acknowledge that this metaphor cannot be quite true. . . . [W]e mitigate rather than acquit because we do not believe emotions are like guns. We believe that we can reason ourselves out of emotion¹⁰⁵

Her reasoning is flawed in a number of ways. First, provocation law should not be analogized to gun-to-the-head duress cases. In duress prosecutions, we do not acquit because the actor lacked the *capacity* to conform his conduct to the law, but rather because the actor lacked a *fair opportunity* to do so.¹⁰⁶ Second, as for Nourse's full-excuse point, we do not fully excuse the provoked party because we do not ordinarily believe that the defendant's loss of self-control is complete. As Nourse puts it, we *do* believe that "we can reason ourselves out of emotion." It is precisely because we believe that the provoked party's capacity for self-control is not completely undermined that the defense is partial.

103. Nourse, *supra* note 16, at 1396-97.

104. *Id.* at 1398.

105. *Id.* at 1398 n.390.

106. See *supra* note 68 (explaining and comparing duress and provocation).

Third, it is not true that the self-control rationale of the defense requires us to provide a similar defense to all defendants who kill in a state of high emotion. As I have shown, it is perfectly appropriate to limit the partial defense to one whose lack of self-control is the result of adequate provocation and not just *any* provocation. The law expresses the normative judgment that the actor "should" have exercised self-control in provocation cases, but we recognize that sometimes a person's capacity to do so is sufficiently undermined by justifiable or excusable factors that it is unfair to hold the person fully accountable.

In short, I submit that Professor Nourse has not devised a suitable alternative to current law.

V. WHERE DO WE GO NOW?

A. MODEL PENAL CODE

One of my failings is that I find it easier to criticize other people's suggestions than to provide cogent solutions. In my own defense, as I stated at the outset, provocation law raises far more difficult issues than some critics of the doctrine seem willing to face. It is a defense not easily conceptualized, but neither is it without intuitive power.

In looking at what form the defense should take, the Model Penal Code (MPC) deserves considerable attention. Professor Nourse's critique of provocation law focused, in particular, on the Code's "extreme mental or emotional disturbance" (EMED) version of the doctrine,¹⁰⁷ which greatly expands on the common law defense and which also incorporates a version of diminished capacity, sometimes called "partial responsibility," within the EMED concept.¹⁰⁸ Much of the criticism of the

107. MODEL PENAL CODE § 210.3(1)(b) (1962) provides that a criminal homicide constitutes manslaughter if

a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall [sic] be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

108. There are two versions of diminished capacity. Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 1 (1984). The first is the *mens rea* model: Evidence of mental abnormality is offered by the defense to negate an element (typically, the *mens rea* element) of the crime. *Id.* at 6. This aspect of diminished capacity is covered by MODEL PENAL CODE § 4.02 (permitting evidence "that the defendant suffered from a mental disease or defect . . . whenever it is relevant to prove that the defen-

provocation doctrine in this country is the result of expansions of the defense inspired by the MPC.

I previously criticized the drafters of the Code for coupling diminished capacity with provocation doctrine.¹⁰⁹ My claim was that it is unwise to bring both defenses under one umbrella. Provocation deals with the emotions and actions of ordinary persons, whereas diminished capacity relates to the thinking processes and actions of extraordinary persons. Provocation deals with ordinary human weaknesses, while diminished capacity focuses on special weaknesses, on illnesses and pathologies.¹¹⁰

This observation regarding the Code's approach is relevant if we want to retain an independent provocation defense, but it loses its force if the drafters—or current lawmakers—wish to move toward a generic mitigation defense. Indeed, Professor Stephen Morse has proposed just that: a generic mitigation defense (he calls it “guilty but partially responsible”¹¹¹) that would apply to *all* crimes, and not simply to criminal homicide.¹¹² After all, if a person is entitled to have his offense reduced if he kills because of some mitigating factor (such as adequate provocation), why shouldn't the same arguments apply if the actor commits an arson or robs a bank or batters another, rather than killing, as the result of the same condition?

Morse makes a strong conceptual case for a generic partial excuse. Although he believes that “[a]ny formula that expressed the central excusing notion would work,”¹¹³ he finds the

dant did or did not have a state of mind that is an element of the offense”).

The second version of diminished capacity, the “partial responsibility” version, only applies in criminal homicide cases. Here, the defendant possesses the state of mind necessary to commit the offense of murder, but is entitled to a reduction in offense because he is less morally culpable as the result of a mental condition affecting his rationality or behavior controls. Morse, *supra*, at 20-21. It is this latter version of diminished capacity that is implicated in the manslaughter cases.

109. Dressler, *Rethinking Heat of Passion*, *supra* note 1, at 459.

110. See also Timothy Macklem & John Gardner, *Provocation and Pluralism*, 64 MOD. L. REV. 815, 815 (2001) (describing the view of *Luc Thiet Thuan v. Regina* [1997] AC 131, that provocation “is a defense available only in respect of *reasonable* losses of temper,” whereas diminished capacity “make[s] allowances for conditions of pathological unreasonableness”).

111. Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, in 23 CRIME AND JUSTICE: A REVIEW OF RESEARCH 329, 397 (Michael Tonry ed., 1998).

112. *Id.* at 397-402.

113. *Id.* at 400.

Code's EMED language attractive. I have concerns with EMED as a generic partial excuse,¹¹⁴ but my purpose here is to consider the EMED defense based on the assumption that a legislature is *not* interested in adopting a generic partial excuse.

Starting from this premise, there are two possibilities. First, some jurisdictions may want to mitigate in both provocation and partial-responsibility circumstances. Second, although I believe a morally sensitive penal code *should* recognize a partial responsibility defense to murder,¹¹⁵ many states may be interested only in retaining a provocation defense. Since this Essay is meant to defend the provocation defense, and not concern itself with diminished capacity, my attention here centers on whether the EMED formula treats provocation doctrine appropriately.

The MPC approach has both strengths and weaknesses. There are various features of the EMED doctrine that belong, I believe, in any modern provocation defense. First, the Code wisely eliminates the old, narrow common law pigeonhole categories of "adequate provocation," which included the rigid rule that words alone can *never* constitute a basis for mitigation.¹¹⁶ The Code recognizes what common experience teaches us: Words can be as explosive as, for example, a physical assault or act of sexual infidelity. Second, as will be seen,¹¹⁷ the Code properly rejects the justificatory-based "misdirected retaliation" rule of the common law to which some modern statutes, unfortunately, cling.¹¹⁸

Third and perhaps most significantly, the MPC heroically struggles—and for this struggle alone, it deserves credit—with an exceptionally troubling issue largely ignored by courts prior to its time. The issue is this: To what extent are a defendant's

114. In my view, any generic partial excuse ought to be more explicit than the EMED language regarding the "central excusing notion." I have set out my version of that central excusing notion in note 68. Presumably, a partial excuse would apply when the actor's capacity or opportunity for "free choice" (as I defined it there) has been somewhat less curtailed than in the case of a full excuse.

115. See, e.g., Joshua Dressler, *Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse*, 75 J. CRIM. L. & CRIMINOLOGY 953 (1984).

116. DRESSLER, *supra* note 79, § 31.07[B][2][a], at 528-29.

117. See *infra* text accompanying note 131.

118. The "misdirected retaliation" rule is explained *supra* in the text accompanying notes 41-44.

subjective characteristics relevant in applying the objective "reasonable person" standard that inheres in the "reasonable explanation or excuse" concept of MPC manslaughter and, for that matter, inheres in the common law "adequate provocation" and "reasonable cooling off time" elements? As developed below,¹¹⁹ the Code permits more subjectivism than traditional law. It is this aspect of the Code that is simultaneously its strength and its potential downfall.

Before turning to the subjectivist aspects of the Code, let me return to the American Law Institute drafters' decision to couple provocation with diminished capacity. For those who want to defend provocation doctrine against attack, this feature of the Code is unfortunate, because it can confuse lawyers and jurors, as well as critics of the principle of heat-of-passion. Consider, for example, *People v. Casassa*,¹²⁰ a New York "provocation" case. The male defendant and the female victim dated casually, after which she told him that she was not "falling in love" with him and sought to end the relationship.¹²¹ This devastated Casassa and resulted in a number of events the Court of Appeals characterized as "bizarre": He broke into her apartment and eavesdropped on conversations she was having with others; and he broke into her home when she was away, arrived armed with a knife, disrobed, and lay on her bed.¹²² On the night of the homicide, Casassa came to her residence, offered the victim several gifts, and when she rejected them, he stabbed her to death with a steak knife.¹²³

These facts have the seeming markings of a provocation case, but one that would *never* qualify as manslaughter according to traditional provocation law. The triggering event here is nothing more than the decedent's rejection of his gifts, which surely is not "adequate provocation"—provocation liable to cause a reasonable person to become sufficiently angry that he might lose his self-control—at common law. Indeed, this case falls so short of adequate provocation that it would almost certainly not present a jury issue in a traditional non-MPC jurisdiction. Under the MPC, or at least the New York Court of Appeals' understanding of the provision,¹²⁴ however, once there is

119. See *infra* Part V. B.

120. 404 N.E.2d 1310 (N.Y. 1980).

121. *Id.* at 1312.

122. *Id.*

123. *Id.*

124. *Id.* at 1316-17.

a finding of EMED¹²⁵ the fact finder must be given the opportunity to determine whether the defendant had a reasonable explanation or excuse for the EMED.

Should this type of case go the jury? Perhaps so, *but not as a provocation case*.¹²⁶ Here is where the MPC approach confuses. Defense counsel presented only one witness to explain the defendant's "bizarre"—that word should alert observers to the fact that this is not really a provocation case—behavior, namely, a psychiatrist "who testified, in essence, that the defendant had become *obsessed* with [the decedent] and that the course which their relationship had taken, combined with several personality attributes *peculiar to defendant*, caused him to be under the influence of extreme emotional disturbance at the time of the killing."¹²⁷

The italicized words of the testimony—testimony of a psychiatrist!—tell us that if Casassa deserved to have his culpability mitigated, it was not because he was "adequately provoked," i.e., his emotional state was not one that a reasonable person would have experienced, but rather because he suffered from "peculiar" personality attributes that might justify mitigating the offense. This is where the Code's Commentary remark—"in the end, the question is whether the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen"¹²⁸—comes into play. Perhaps because of Casassa's unfortunate mental condition, he could not control himself like an ordinary person and, therefore, is less culpable than the ordinary intentional killer, but this is not in any useful sense a provocation case. Critics of the doctrine, in other words, should not see *Casassa* or its ilk as a cause célèbre. Many EMED cases are really diminished-capacity cases disguised in heat-of-passion garb.

I fear the Code's decision to collapse provocation and diminished capacity into one EMED defense ultimately may dis-

125. The New York manslaughter statute, N.Y. PEN. LAW § 125.20(2) (McKinney 1998), uses the term "extreme emotional disturbance" (EED)—the word "mental" is omitted—but this difference does not affect the analysis.

126. Furthermore, perhaps even some New York courts agree that EMED cases should not always go to the jury. *E.g.*, *People v. Walker*, 473 N.Y.S.2d 460, 461-62 (1984) (affirming, over a dissent, a trial judge's refusal to instruct the jury on manslaughter where W, an illegal narcotics dealer, killed his supplier in a restaurant after an argument about a prior deal, and sought to claim EMED).

127. *Casassa*, 404 N.E.2d at 1313 (emphasis added).

128. MODEL PENAL CODE AND COMMENTARIES § 210.3, at 63.

serve both doctrines. It expands the former doctrine beyond reasonable lines and, to the extent that people see cases like *Casassa* as permitting provocation claims of this sort to go to the jury, unnecessarily brings the heat-of-passion defense into disrepute. At the same time, a defense lawyer who focuses too much on *Casassa*-like external "provocations" and too little on psychiatric testimony of the defendant's impaired self-control mechanisms or cognitive capacities is likely to weaken her client's diminished capacity claim. And in a jurisdiction that wishes to retain the provocation defense but (I think unwisely) repeal the diminished capacity doctrine, a *Casassa*-type case might be improperly resolved.

One other weakness in the EMED formula deserves attention within the context of the provocation doctrine: The manslaughter provision does not require that the EMED be the result of provocation in the sense of any triggering act by the decedent or another that acts upon the defendant. For example, if Donald becomes enraged at the sight of Elmer and kills him, and later claims that his EMED was the result of the fact that Elmer reminded him of his despised brother Frank, Donald is entitled to have the jury consider his mitigation claim despite the absence of any provocation.¹²⁹

Again, this omission is understandable in view of the diminished capacity overtones of the doctrine, but is undesirable from a heat-of-passion perspective. The requirement of some provocation—insulting words, an unwanted physical touching, adulterous behavior, or even the September 11 attack on the country—focuses the jury's attention where it belongs in a provocation case, namely, on some triggering event that potentially "justifies" or "excuses" the defendant's anger (something that either makes us feel that anger is appropriate or, at least, understandable), which in turn explains the actor's loss of self-control.

Based on these observations, then, I would conclude that the EMED formula crafted by the American Law Institute is flawed, but includes positive features. I next consider the most important feature of the MPC manslaughter provision, namely, its more subjectivist cast.

129. See *State v. Elliott*, 411 A.2d 3, 7-8 (Conn. 1979) (holding that no provoking or triggering event is required under the EMED formula and therefore overturning a murder conviction because the jury was not permitted to consider a manslaughter claim where E, who had for years feared his brother, killed his brother for no apparent reason).

B. SUBJECTIVIZING THE DOCTRINE: THE MODEL PENAL CODE

The Code begins objectively: There must be a "reasonable explanation or excuse" for the defendant's EMED. It qualifies this standard, however, by providing that the reasonableness of the explanation or excuse be determined "from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."¹³⁰ The Commentary states that the phrase "under the circumstances as he believes them to be" is meant to clarify the role of mistake in provocation law. Thus, if a person "reasonably but mistakenly identifies his wife's rapist and kills the wrong person[, he] may be eligible for mitigation if his extreme emotional disturbance were otherwise subject to reasonable explanation or excuse."¹³¹

This aspect of the EMED provision is desirable because it rejects the justification-based "misdirected retaliation" rule. This same language, however, opens the door to much bigger issues. Consider the following Racist or Mixed Up Father Hypothetical:

Arnold is the father of a seventeen-year-old daughter, Betty, whom he loves dearly. Arnold has never committed an act of violence toward any person, of any race, in the past. Nor does he generally favor such activities. However, Arnold believes that African-American males possess an invisible germ that can kill non-African-Americans with whom they have skin-to-skin contact. Arnold observes Betty talking to Carl, an African-American friend. Carl is touching Betty's hand. Arnold, fearful for his daughter's life, tells Carl to let go of his daughter's hand. Carl does so, looks at Arnold in bewilderment, and says to Betty, "What in the world is bothering your father?" Powerfully enraged by Carl's lack of concern for his daughter's safety, Arnold stabs Carl to death.

Does Arnold have an EMED claim, and should he? According to *Casassa*, upon adequate proof that the defendant suffered from an EMED at the time of the homicide, the issue of whether there is a reasonable explanation or excuse for his condition must be left to the fact finder. So, this case would go to the jury. The reasonableness of Arnold's rage, however, must be considered by the jury "from the viewpoint of a person in the actor's situation *under the circumstances as he believes them to be.*" Here the italicized language requires the jury to look at Arnold's emotional state from the bizarre perspective of one who believes that black men spread deadly germs and, therefore, that Carl endangered Arnold's daughter's life. Seen

130. MODEL PENAL CODE § 210.3(1)(b) (1962).

131. MODEL PENAL CODE AND COMMENTARIES § 210.3, at 62.

this way, Arnold not only has a viable jury issue, but very possibly a winning argument for mitigation.

How do we feel about this? Perhaps we should ask ourselves why Arnold thinks this way. One possibility is that he suffers from clinical paranoia and should be seen as bringing a diminished capacity, as opposed to a provocation, claim. That makes sense, and would allow a jury to mitigate his crime on grounds that do not require it to make sense of his anger. Yet, some would look at these facts and draw the conclusion that Arnold is simply a racist, no more and no less.¹³² If so, a diminished capacity claim seemingly drops out, which forces us to reconsider what the Code would have us do with him.

I am not entirely sure how the Code intends to deal with Arnold's case in a non-diminished capacity context. The Commentary explains that the word "situation" in the phrase "from the viewpoint of a person in the actor's situation" is "designedly ambiguous."¹³³ According to the Commentary, this term is meant to allow a jury to consider a defendant's "personal handicaps and some external circumstances," but there are limits to subjectivization: It is "equally plain that idiosyncratic moral values"—the Commentary gives an example of an assassin who kills a political leader because he believes it is right to do so—"are not part of the actor's situation. An assassin . . . cannot ask that he be judged by the standard of a reasonable extremist. Any other result would undermine the normative message of the criminal law."¹³⁴ The Commentary concedes that there are many cases between these extremes—"matters . . . [not] as integral a part of moral depravity as a belief in the rightness of killing"¹³⁵—that are better left to common law resolution. The bottom line is the already-quoted observation that "in the end, the question is whether the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen."¹³⁶ Thus, it seems, the middle cases may go to the jury.

Assuming we characterize Arnold as a racist,¹³⁷ is this a "middle case" that should be sent to the jury to consider the

132. Of course, his racism could be the result of clinical paranoia, which brings us conceptually back to a diminished capacity claim.

133. MODEL PENAL CODE AND COMMENTARIES § 210.3, at 62.

134. *Id.*

135. *Id.*

136. *Id.* at 63.

137. *But see infra* text accompanying note 142.

situation from his viewpoint, or are we dealing now with an "idiosyncratic moral value"? At first, one would want to put Arnold in the assassin category. Isn't "reasonable racist" a virtual oxymoron, at least if "reasonable" means empirically accurate?¹³⁸ If so, and if racists are placed in the same category as assassins (or, in today's mental processes, terrorists), there is a conflict between this interpretation of the Code (which results in *excluding* Arnold's explanation for his EMED) and the interpretation above that seems to require us to look at factual circumstances from the actor's faulty perspective—that Arnold genuinely believes that Carl was spreading a deadly germ to his daughter.

But wait: The Commentary seems to exclude the assassin from protection because of his "belief in the rightness of killing." That is, the drafters may be thinking here of a person, like perhaps a contract killer, who simply believes that killing people, like swatting flies, is morally acceptable. If this *is* the point of the Commentary, Arnold is *not* equivalent to an assassin. Arnold does *not* equate killing people to swatting flies. His goal here—his reason for killing Carl—is not an idiosyncratic one if we tell the story his way: It is to protect a life he values from a threat he (mistakenly) perceives. Thus, we might be back to taking Arnold's bizarre beliefs into play, and letting the jury decide whether they feel sympathy for him, despite his racial thought processes.

This may be the Code's solution, on the ground that Arnold does not hold to a belief that, if incorporated into the objective standard, expressly contradicts the normative anti-violence message of the criminal law. Racism, however, violates critical community norms, and a rule that a defendant who kills someone may then use his racist views to mitigate his offense (because he has a "reasonable" explanation for his anger) seemingly undermines criminal law norms—thus, the puzzle.

Let us put Arnold aside for a moment and consider a different case, this one from Australia.¹³⁹ Stewart, a member of an Aboriginal tribe, spoke about tribal secrets in the presence

138. See Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 788 (1994).

139. Robert L. Misner, *The Awkward Case of Harry Gibson*, 1986 ARIZ. ST. L.J. 691 (discussing *Regina v. Gibson*, an unreported case decided by the Supreme Court of South Australia (1973) (on file with the *Arizona State Law Journal*)).

of women and young men, in violation of tribal norms. Another tribesman, Gibson, unsuccessfully sought to stop Stewart from violating the norm and, when he failed to do so, killed Stewart. Gibson was tried before a jury of non-Aboriginals.¹⁴⁰

Notice that Gibson does not claim a mistake of fact as Arnold did, but rather wants to bring to the jury's attention a culturally-based value system that presumably conflicts with the jury's belief system, but which will explain his otherwise inexplicable outrage. What is the Model Penal Code approach to the case? As I read the Code and Commentary, a judge would have to decide whether Gibson possessed an "idiosyncratic moral value." In the absence of such a finding, this case would go to the jury, which would be asked to consider the reasonableness of Gibson's anger from the perspective of one who lives in and accepts the Aboriginal culture.

Of course, in deciding whether Gibson possesses "idiosyncratic moral values," we put ourselves right in the middle of great battles being waged about the values (or lack thereof) of multiculturalism, and how the law should handle the sometimes conflicting goals of multiculturalism and other important societal concerns.¹⁴¹ Do we see the Gibson case as involving simply a different moral or religious value system deserving of sufficient respect that the jurors should try, as best possible, to put themselves in Gibson's shoes, or do we characterize this as a patriarchal or sexist value system undeserving of legal protection in the EMED formula? Again, if the drafters of the MPC only meant by "idiosyncratic moral values" those values that place a low value on human life, Gibson seems entitled to his chance before a jury.

140. *Id.* at 691.

141. *E.g.*, Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1097 (1996) (advocating that the law deal with the conflict by balancing "the Defendant's interest in using cultural evidence that incorporates discriminatory norms and behaviors" and the "victims' interests in obtaining protection and relief through a non-discriminatory application of the criminal law"); Catherine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687, 694-700 (2000) (discussing the postmodern "multicultural defense for male violence"); Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36, 37-38 (1995) (discussing whether attempts to increase "judicial responsiveness to claims of pluralism raised by defendants who are not part of the dominant culture" conflicts with attempts to increase "the court's vigor in prosecuting crimes of family and anti-woman violence").

C. SUBJECTIVIZING THE DOCTRINE: MY OWN THOUGHTS

Once I shift from the MPC's ambiguous solution to these issues to my own approach, I concede that I am also unsure of precisely where I want to draw the lines in specific cases, but lines there must be. The first line I would draw would be based on what I will call the "oxymoron principle." That is, the concept of reasonableness that inheres in the provocation doctrine cannot be so flexible as to permit incorporation of an attribute or belief of the provoked actor that would force us to describe the "reasonable person" in near oxymoronic terms. One cannot be a "reasonable paranoid," for example. If the defendant *is* paranoid, his claim should be that of diminished capacity; he is not entitled to ask us to see the world, and thus understand his reasons for feeling angry, from the perspective of a paranoid person.

Where does this take us, for example, with father Arnold if we characterize him as a racist? The understandable tendency when we characterize a person this way is to consider him unreasonable. Therefore, we refuse to consider a claimed provocation from the actor's "unreasonable" (e.g., racist) perspective.¹⁴² In one sense, Arnold *is* a racist: He generalizes about people (at least on one matter) by race; that generalization is a negative one in that he considers a whole category of people, African-American males, dangerous to another race of people. Yet, in the story I have told he wants no harm to come to African-Americans simply because of their race (although one would assume he would want to live in some version of apartheid). On a racism continuum, if you will, Arnold's version is surely less malignant than that of one who favors genocide. Indeed, assume for a moment that Arnold not only holds the ignorant ideas already ascribed to him, but that he also believes that *white people* carry lethal germs that will kill non-whites if there is skin contact. This does not make Arnold any less racist in the sense described above, and he is now even more ignorant

142. An initial observation: We should hesitate before characterizing someone as, for example, "a racist" or "an anti-Semite," even though such people obviously exist. To label someone this way is to harshly judge that person's character. A little humility on our part regarding our capacity for judging others—and regarding our standing to do so—is not a bad thing, especially when we are talking about punishing people in our name. See Jeffrie G. Murphy, *Moral Epistemology, the Retributive Emotions, and the "Clumsy Moral Philosophy" of Jesus Christ*, in *THE PASSIONS OF LAW* 149, 157 (Susan A. Bandes ed., 1999).

than in the original hypothetical, but this additional information may make us now think of Arnold less as a malignancy than as a pathetically ignorant or confused (and dangerous) person. He does not possess idiosyncratic moral views as much as he possesses "idiosyncratic"—no, let's call it "amazingly stupid"—ideas about disease production.

In Model Penal Code terms, I would not characterize Arnold as one who possesses idiosyncratic moral views. He is *not* like the assassin or terrorist or Ku Klux Klanner who espouses the justifiability of killing innocent persons on the basis of race. At the same time, I submit it is unacceptable to ask a jury to see the world as Arnold believes it exists—that everyone is running around with lethal germs that will kill people of another race if they touch—and then for the jury to determine if he has a "reasonable explanation or excuse" for his anger, or in common law terms, to determine whether a "reasonable person" with those views would become so angry that he might lose self-control. Although there will always be line-drawing problems in this regard, I have no trouble concluding that incorporating Arnold's belief system in the "reasonable person" violates the oxymoron principle, not because Arnold is a racist, but simply because he is holding on to patently unreasonable ideas that are verifiably false.¹⁴³ For me, if Arnold's actions are mitigated to manslaughter it is because his beliefs are a symptom of something much deeper within his psyche that has affected his capacity for rationality, if not his self-control. This is *not* a legitimate provocation case in my mind; it is (if at all) a diminished capacity claim.¹⁴⁴

143. Arnold's mistake is unlike the mistake the drafters of the EMED formula had in mind, e.g., a defendant who looks for his wife's rapist and mistakenly kills an innocent person. A person can make a mistake regarding the identity of a rapist and still be a "reasonable person"; Arnold's errors render him unreasonable.

144. Defenders of the Code might respond to me as follows: "By collapsing two defenses into one, the Code does us a service. If we can agree that Arnold's case should end up with the jury *somehow*, why care which theory gets us there?" As I have said earlier, if one wants to abandon provocation and diminished capacity in favor of a generic partial defense, this comment may be right (although I might want to redraft the partial excuse, *see supra* note 114). My purpose here, however, is to try to show why a jurisdiction that wants to retain the provocation doctrine, *as such*, should handle such cases. And, to the extent that a jurisdiction also wants to make room for a diminished capacity claim, it is better for lawyers to see what it is they are *really* arguing, and for jurors to have a clearer idea of what moral statement a verdict to mitigate is making (and *not* making).

The Aboriginal case is a different matter, as Gibson does not claim any mistake of fact, but rather acted within a different cultural framework. Here, as I see it, we must decide if allowing him to explain his reason for his anger on the basis of a belief system foreign to the jury would violate the anti-violence norms of the criminal law.

Cultural differences can be minor or quite substantial. If I were a judge and had the requisite authority, I would send the Gibson case to the jury for its consideration. I would do so for two reasons. First, there is nothing from these facts that suggests that Aboriginals value human life less than non-Aboriginals. And, in a society that values free thought, a judge representing the law and authority should be exceedingly hesitant to characterize a moral value or cultural belief as beyond the pale and, as a result, deny the defendant the opportunity to make his claim to the jury. Second, we need to trust in juries for the reasons I have already expressed.¹⁴⁵ In the Gibson case I would take it that a jury would not consider his anger appropriate—even in a society that values multiculturalism, the dominant culture is not required to accept the values of another community—but it might (or might not) find his anger excusable, and it might (or might not) find his *degree* of anger sufficiently understandable in this context that it is prepared to say that a person in that condition would likely find it exceedingly difficult to control himself.

Consider instead the following case: A generally mild-mannered person, call him Guest, thinks abortion is murder. Guest is invited with his wife to a new neighbor's home, call him Host, for dinner. Host turns out to be a doctor who works at a local abortion clinic. Upon learning this, Guest begins to leave, but his wife gently convinces him to be sociable and stay. Host continues to talk about the abortions in a way that strikes Guest as callous. Enraged at hearing Host speak so calmly about what Guest considers genocide, Guest loses self-control and strangles Host.¹⁴⁶

I would consider this a jury issue on provocation. Guest is a mild-mannered person. He does not espouse the moral view that abortionists should be murdered; he is *not* claiming he did the right thing in killing Host. He simply became immensely angry because, based on his moral belief that fetuses are hu-

145. See *supra* notes 89-93 and accompanying text.

146. Herbert Morris suggested this hypothetical to me.

man beings, he was listening to a "murderer" describe his "serial crimes" without remorse.

In my view fetuses are not human beings. Nonetheless, the idea that they are (or are not) cannot be empirically verified, because the concept of "human being-ness" is a philosophical, moral, and religious issue about which there is considerable dispute among philosophers, ethicists, and religious scholars. Since one is surely entitled in our society to hold the moral or religious view that fetuses are humans, the law can hardly deny that a person possessing such views would (or even should) become enraged upon listening to a doctor describe his repeated actions of killing "human beings." Guest's rage, therefore, is as understandable given *his* beliefs as Host's would be if he were listening to a "pro-lifer" explain how he goes about methodically killing abortion providers. As a juror, I would probably not partially excuse the homicides in either case, but I still consider these jury cases.

I would reserve the limiting judicial role, as the MPC does, to cases in which the defendant's belief system unmistakably violates the anti-violence norms of the criminal law, for example, assassins, terrorists, and violence-justifying racists. There will be precious few of these circumstances because most of the extreme cases will already be excluded by the oxymoron principle and/or would properly fall on the diminished capacity side of the line.

D. MY PROPOSAL

I have noted certain flaws in the Model Penal Code manslaughter provision. Despite my criticisms, the Code's overall effort strikes me as positive. Nonetheless, particularly for those who prefer (as I do) to separate diminished capacity from provocation, a somewhat different form of the defense is appropriate.

In this regard, the English Homicide Act of 1957 is a good starting point for thinking about a specific heat-of-passion defense:

Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have

on a reasonable man.¹⁴⁷

This statute differs from the MPC in various ways: It very clearly is a provocation defense and expressly focuses on the actor's loss of self-control (a virtue); it requires some provocative event that triggers the loss of self-control (a virtue); and the statute does not on its face invite subjectivization (a mixed blessing).¹⁴⁸ It is similar to the MPC in various regards: It abandons the common law categories of adequate provocation and permits words alone to qualify as adequate provocation (a virtue); and it leaves the question of the adequacy of the provocation to juries (generally good).

I am not entirely satisfied with the language of the statute. The ultimate issue should not be whether "the provocation was enough to make a reasonable man do as he did,"¹⁴⁹ because "reasonable men" do not kill others when provoked, least of all in the ultra-violent way provoked killers often do it. Instead, the issue should be articulated as follows: Whether the provocation "might render ordinary [persons], of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion, rather than judgment."¹⁵⁰ This language keeps the focus where it belongs: on whether the defendant's loss of self-control is something that a reasonable or ordinary person might experience, and not whether there is a reasonable explanation or excuse for the homicide itself.¹⁵¹

My proposed statute (or, alternatively, jury instruction) would read as follows:¹⁵²

A killing that would otherwise constitute murder constitutes the affirmative defense of manslaughter if the killing occurs as the result of an apparent provocation, whether by things done or things said or by both together, that might¹⁵³ cause a reasonable [ordinary¹⁵⁴] person,

147. Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 3 (Eng.).

148. Though not subjective on its face, the House of Lords has interpreted the statute to permit widespread subjectivization. *E.g.*, *Regina v. Smith*, 1 A.C. 146, 155-56 (H.L. 2001) (Lord Slynn of Hadley, arguing that the particular characteristics of the accused be taken into account in the determination of a reasonable person); *Dir. of Pub. Pros. v. Camplin*, A.C. 705, 716-18 (H.L. 1978) (Lord Diplock, stating that the jury is entitled to use evidence of the defendant's characteristics in determining the reasonable person).

149. Homicide Act, 1957, § 3.

150. *Maher v. People*, 10 Mich. 212, 219 (1862).

151. *People v. Casassa*, 404 N.E.2d 1310, 1316 n.2 (N.Y. 1980).

152. I previously drafted a proposed manslaughter statute. Dressler, *Re-thinking Heat of Passion*, *supra* note 1, at 468. Upon twenty years of reflection, I have substantially redrafted it.

153. I use the word "might" rather than "would." If a provocation *would*

of average disposition, to lose self-control and act rashly and without due deliberation; in making this determination, the fact finder shall take into account everything both done and said according to the effect which, in its opinion, it would have on a reasonable [ordinary] person in the actor's situation, according to the factual circumstances as such person would believe them to be.

As drafted, the statute or jury instruction treats manslaughter as an affirmative defense. As such, a legislature could constitutionally allocate the burden of persuasion in regard to the defense to the defendant.¹⁵⁵

The doctrine, as drafted, requires some external event (thus, the requirement of "things done or said"), but it need only be an *apparent* provocation. Thus, the defense potentially applies to a situation in which *no* provocation occurred, although one *appeared* by words or actions to have taken place.¹⁵⁶ For example, a defendant who *incorrectly* believes (from another's words or actions) that one's spouse committed adultery may claim the defense, as long as his belief that adultery occurred is based on "factual circumstances" as a reasonable person "would believe them to be." In short, provocation may be based on a reasonable mistake of fact that adultery occurred.¹⁵⁷

As I favor some subjectivization of the "reasonable person" test, I have chosen to use the MPC language "in the actor's situation,"¹⁵⁸ with its designed ambiguity. I have already set out what I consider to be appropriate limits on the subjectivization of the objective standard,¹⁵⁹ but a few other points deserve attention here. In considering which characteristic may properly be incorporated, I submit it is useful to distinguish between characteristics of the defendant that assess the level of self-control to be expected of the reasonable person and those that measure the gravity of the provocation to the "reasonable

cause a reasonable/ordinary person to lose self-control, a full excuse seemingly would be justifiable. *See id.*

154. *See supra* note 65.

155. *See Patterson v. New York*, 432 U.S. 197, 206-07 (1977).

156. The defense would not apply to a case in which the defendant kills, for example, because the decedent's mere looks reminded him of his enemy, *see supra* note 129 and accompanying text, although a diminished capacity doctrine might well apply there.

157. The defense may also be claimed if adultery *did* occur but the defendant mistakenly killed the wrong person, e.g., the adulterer's twin, as long as he acted on the basis of factual circumstances that would cause a reasonable (or ordinary) person to be mistaken as to the wrongdoer.

158. MODEL PENAL CODE § 210.3 (1)(b) (1962).

159. *See supra* Part V.C.

man.”¹⁶⁰ Thus, the objective standard excludes a defendant’s short-temperedness, for if it did not, pugnacious persons would be treated more leniently than longer-tempered persons. Likewise, any other characteristic of the defendant (e.g., that he is drunk at the time of the provocation¹⁶¹) that provides him with less-than-ordinary capacity for self-control must be excluded from the standard.

In contrast, characteristics of the defendant (other than those excluded pursuant to the oxymoron principle or which would undermine the normative message of the criminal law) that would help the jury measure the *gravity* of the provocation to the defendant ought to be incorporated. Thus, Gibson’s cultural beliefs in the Aboriginal case¹⁶² would be considered by the jury, as would the race of the defendant if, for example, the decedent’s words or actions would inflame a person of that race to a greater extent than others.

Finally, I have slightly rephrased the MPC language (“under the circumstances as he believes them to be”¹⁶³ becomes “under the *factual* circumstances as *such person* believes them to be”), in order to deal with Racist or Mixed Up Father Hypothetical. If I am right that the MPC language might require the jury to consider the facts in that case from Arnold’s perspective, including his mistaken belief about germs, the revised language will hopefully avoid this unfortunate outcome. The words “such person” refer to the “reasonable [or ordinary] person in the actor’s situation” and not to the defendant; thus, only those mistakes of fact by the defendant that might also be imputed to a reasonable person would be considered by the jury. Thus, in Arnold’s case, a provocation claim does not lie.

So, to summarize: Provocation should be a defense, based on a partial excuse theory, separate from the diminished capacity doctrine. Contrary to Professor Nourse’s suggestion, the required provocation need not constitute a criminal act that society punishes; indeed, any actions or words can *potentially* qualify. The defense must navigate a fine line between subjectivism and objectivism. As I have shown, Arnold the father

160. See Jonathan Herring, *Provocation and Ethnicity*, 1996 CRIM. L. REV. 490, 490. But see Regina v. Smith, 1 A.C. 146 (H.L. 2001) (rejecting the distinction set out in the text between gravity of provocation and powers of self control).

161. See, e.g., Regina v. Newell, 71 Crim. App. R. 331, 339-40 (1980).

162. See *supra* text accompanying notes 139-41.

163. MODEL PENAL CODE § 210.3 (1)(b) (1962).

would not have a provocation claim, but Gibson the Aboriginal, Guest the pro-lifer and Host the pro-choicer would have the right to have their cases heard by the jury, even though we know that juries sometimes reach results that do not please us.¹⁶⁴

On the other hand, the defendant has the burden of producing evidence sufficient to bring the defense into play. The jury is the best institution to evaluate provocation claims, but contrary to the MPC and the English Homicide Act, not all provocation claims merit a jury hearing. Jurisdictions vary on how much evidence is required for any affirmative defense to go to the jury:

"some evidence," "more than a scintilla," "slight evidence," . . . "evidence sufficient to raise a reasonable doubt," "evidence that would justify a reasonable jury in finding the existence or non-existence of the fact," and evidence that would allow a rational factfinder to conclude "there is a sufficiently high probability that the relevant issue will be proved."¹⁶⁵

The provocation defense should be treated no differently in this regard than other affirmative claims.

CONCLUSION

I stated at the outset that provocation law raises difficult and troubling issues. Although I do not believe that the defense is intended to justify or excuse domestic violence, it undeniably permits some violent men to avoid the harshest punishment available for their crimes. One ought to feel disquiet at this fact whether one is a critic of the defense or its defender. Nonetheless, the provocation defense plays an important role in homicide law. Particularly with serious felonies like criminal homicide, the law is well-served by partial excuses that permit juries to finely tune levels of criminal responsibility on the basis of differential culpability. As long as people get angry and that anger affects their capacity for self-control, there will be a need for a partial legal excuse that recognizes the fact that even people who possess normal levels of self-control sometimes "lose it."

Feminist criticisms of the provocation doctrine in the

164. Lest we forget it, judges live in the same world as jurors, and therefore, are not *entirely* immune from the same prejudices and biases that infect the community as a whole. See Joshua Dressler, *Judicial Homophobia: Gay Rights' Biggest Roadblock*, 5 C.L. REV., Jan.-Feb. 1979, at 19.

165. 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 4(c), at 35-36 (1984).

United States focus most particularly on the Model Penal Code version of the defense. I have shown that some of the cases that fall under the "extreme mental or emotional disturbance" umbrella are not really provocation cases at all. My proposed version of the defense would move the law away from the latter formula, but there is no denying that my approach—indeed any reformulation that does not carve out special rules for domestic violence cases—will result in female-unfriendly outcomes as long as males, more often than females, externalize their anger when provoked. This fact should not cause us to forget that provoked killers do *not* avoid convictions for their actions: Even if the defense applies, which it does not in all cases, and even if the jury accepts the defense, which it does not in all cases, the defendant is convicted of manslaughter.

Manslaughter is not a trivial offense. Manslaughterers do not avoid significant societal condemnation and they can receive significant punishment for their offense.¹⁶⁶ It is wrong, however, to stigmatize, condemn and punish a person to the extent that we do a murderer simply because that individual only lives up to the standard of the ordinary law-abiding but imperfect person in similar circumstances. We may want people to be better than they are, but the criminal law is not meant to make people virtuous or punish them for being less than that.

The provocation defense is centuries old. It should not be abolished.

166. See *supra* note 8.